CLERK'S OFF.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 154.

THE HIBERNIA SAVINGS AND LOAN SOCIETY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 4, 1905.

(19,589.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1905.

20*d* This check, properly countersigned and indorsed, is payable any time within four months from its date, at the U. S. Treasury offices in Washington, Boston, New York, Philadelphia, Baltimore, Cincinnati, Chicago, St. Louis, New Orleans, and San Francisco. After that period it is payable only at the U. S. Treasury in Washington.

21 EXHIBITS A & B.

(See Inserts 1 and 2, Attached.)

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.:

Robert J. Tobin being duly sworn, deposes and says that he is the secretary and an officer of The Hibernia Savings and Loan Society, the plaintiff in the foregoing amended complaint; that he has read said amended complaint and knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

ROBERT J. TOBIN.

Subscribed and sworn to before me this 1st day of December, 1900.
[SEAL.] CHAS. T. STANLEY,
Notary Public in and for the City and County
of San Francisco, State of California.

10 ct. revenue stamp.

(Endorsed:) Service of the within amended complaint and receipt of a copy thereof is hereby admitted this 3rd day of December, A. D. 1900. Frank K. Lane, attorney for defendant. Filed 3:30 p. m., Dec. 3, 1900. Wm. A. Deane, clerk. By T. C. Maher, deputy clerk.

22 (Title of Court and Cause.)

Demurrer to Amended Complaint.

Now comes the defendant in the above entitled action and demurs to the amended complaint of plaintiff on file herein and for cause and ground of demurrer assigns and specifies the following:

That said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

And defendant demurs to the first count or cause of action attempted to be set forth in said amended complaint and for cause and ground of demurrer assigns and specifies the following:

That said first count or cause of action does not state facts sufficient to constitute a cause of action against the defendant.

III.

And defendant demurs to the second count or cause of action attempted to be set forth in said amended complaint and for cause and ground of demurrer assigns and specifies the following:

That said second count or cause of action does not state facts sufficient to constitute a cause of action against this defendant.

23 Wherefore defendant prays to be hence dismissed with its costs.

FRANKLIN K. LANE,
City Attorney, Attorney for Defendant.

(Endorsed:) Service by copy of within original is hereby admitted this 5th day of December, A. D. 1900. Tobin & Tobin, attorneys for plaintiff. Filed 3 p. m. Dec. 5, 1900. Wm. A. Deane, clerk. By T. C. Maher, deputy clerk.

(Title of Court and Cause.)

Judgment.

The above cause having come on regularly for hearing on this 12th day of December, 1900, upon the amended complaint of plaintiff and the demurrer of defendant thereto, Messrs. Tobin & Tobin appearing for the plaintiff, and Franklin K. Lane, Esq., appearing for the defendant; and it being shown that the sum of twenty-six thousand three hundred and twenty-four and fifty hundredths ($26,324.50) dollars, with interest, is justly due plaintiff from defendant, and that the board of supervisors of said city and county

24 did, on the 29th day of October, 1900, by resolution number 985, order and direct Franklin K. Lane, attorney for said city and county to allow judgment to be entered in said action against the defendant herein, in the sum of twenty-six thousand three hundred and twenty-four and fifty hundredths ($26,324.50) dollars, with interest from the 27th day of November, 1899; and said demurrer having been duly submitted to the court for consideration and decision, now therefore:

It is hereby ordered, adjudged and decreed, that the demurrer of defendant to the first cause of action in plaintiff's amended complaint set out, be and it is hereby overruled without leave to defendant to answer; and that the demurrer of defendant to the second cause of action in said plaintiff's amended complaint set out be, and it is hereby sustained without leave to plaintiff to amend.

Wherefore, by reason of the law and the premises, it is hereby ordered, adjudged and decreed, that the defendant The City and County of San Francisco pay to the plaintiff the sum of twenty-six thousand three hundred and twenty-four and fifty hundredths ($26,324.50) dollars, with interest thereon from the 27th day of November, 1899, and judgment for that sum in United States gold

coin is hereby given in favor of said plaintiff and against
25 said defendant, upon the first count of plaintiff's amended complaint.

It is further adjudged and decreed, that plaintiff take nothing in and by its second cause of action, in its said amended complaint set out.

J. C. B. HEBBARD,
Judge of the Superior Court.

Dec. 12th, 1900.
Recorded Dec. 13th, 1900.
Book 59, page 130.

(Endorsed:) Filed 1 p. m. Dec. 12, 1900. Wm. A. Deane, clerk. By T. C. Maher, deputy clerk.

(Title of Court and Cause.)

Certificate to Judgment Roll.

CITY AND COUNTY OF SAN FRANCISCO, *ss*:

I, Wm. A. Deane, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled cause, and recorded in Judgment Book 59 of said court, at page 130. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

26 Witness my hand and seal of said superior court this 13th day of December, A. D. 1900.

[SEAL.]

WM. A. DEANE, Clerk,
By D. DE V. GRAHAM,
Deputy Clerk.

(Endorsed:) Filed Dec. 13th, 1900. Wm. A. Deane, clerk. By D. de V. Graham, deputy clerk. Recorded Judgment Book 59, page 130.

(Title of Court and Cause.)

Notice of Appeal.

You are hereby notified that the plaintiff in the above entitled cause does hereby appeal to the supreme court of the State of California, from that part of the judgment duly given, made and entered herein, on the 13th day of December, 1900, wherein and whereby the demurrer of the defendant to the second cause of action in plaintiff's amended complaint set out was sustained without leave to plaintiff to amend; and wherein and whereby it was adjudged and decreed that plaintiff take nothing in and by its second cause of action in its said amended complaint set out.

TOBIN & TOBIN,
Attorneys for Plaintiff.

27 To the defendant in the above entitled cause, and to its attorney Franklin K. Lane, Esq.

Dated this 8th day of January, 1901.

(Endorsed:) Filed 9:15 a. m. Jan. 9, 1901. Wm. A. Deane, clerk. By T. C. Maher, deputy clerk.

Service of the within admitted by copy this 8th day of Jan. 1901.
FRANKLIN K. LANE,
Attorney for Def't.

Stipulation.

It is hereby stipulated, agreed and certified that the foregoing papers constitute the judgment roll in the superior court in said case, and that the foregoing are full, true and correct copies of the original of said papers on file in said action, and that they constitute the transcript on appeal, and that said transcript is correct, and are true and correct copies of the said papers on file in said action.

It is further stipulated, agreed and certified, that a good and sufficient undertaking on appeal has been duly given, and in due season properly filed in said action, and in the manner and within
28 the time prescribed by law.

Dated March — 1901.

FRANKLIN K. LANE,
City and County Attorney, Attorney for Respondent.
TOBIN & TOBIN,
Attorneys for Appellant.

Clerk's Certificate to Transcript.

I, Wm. A. Deane, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court in and for said county, do hereby certify that I have compared the foregoing transcript with the original papers in the foregoing entitled action, now on file in my office, and with the orders therein made and entered on the minutes of said court, and that the said papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that a sufficient undertaking on appeal in due form of law was properly filed in said cause, and that the erasures and interlineations were made before certifying hereto.

29 In witness whereof I have hereunto set my hand and affixed the seal of the said superior court this — day of March, 1901.

[SEAL.] WM. A. DEANE, Clerk,
By —— ——, Deputy Clerk.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a

true and correct copy of original transcript as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of December, A. D. 1901.

[Seal Supreme Court of California.]

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

30 Due service and receipt of a copy of the within is hereby admitted this 8th day of March, 1901.

FRANKLIN K. LANE,
City Attorney, Attorney for Respondent.

31 Filed June 3, 1903. Frank C. Jordan, Clerk, by R. D. Duke, Deputy.

Copy.

Department One.

THE HIBERNIA SAVINGS & LOAN SOCIETY, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.
} S. F., No. 2683.

This action was brought by plaintiff to recover certain taxes for the fiscal year 1899–1900, paid by it under protest. Defendant demurred to the complaint, and the demurrer to the count in which it was sought to recover $1986.55 taxes, paid by plaintiff under protest upon two checks or orders of the Treasurer of the United States, was sustained. Judgment was thereupon entered for defendant so far as said count was concerned, and plaintiff appeals therefrom. The only question presented by the appeal is as to whether or not these checks or orders were taxable by the State or municipality.

The orders, as is shown by the complaint, were included in the assessment against plaintiff as "solvent credits." They were drawn January 1, 1899, by the Treasurer of the United States in favor of plaintiff, addressed to "The Treasurer or Assistant Treasurer of the United States," and directing the payment to plaintiff of the amount named therein and the charging of the amount to "Treasurer U. S. in general account." Upon each of the orders was an endorsement to the effect that the same properly countersigned and indorsed is payable any time within four months from its date at the Treasury or any sub-treasury in the United States, and that after that period it is payable only at the U. S. Treasury at Washington. One
32 of the orders was for $120,000, in payment of quarter yearly interest due January 1, 1899, on U. S. four per cent. consols of 1907, and the other was for $1875, in payment of quarter yearly

interest due January 1, 1899, on U. S. three per cent. consols of 1908. These orders were, so far as the complaint shows, delivered to and accepted by plaintiff immediately upon being drawn, and were retained by it until after the first Monday of March, 1899, and, being in the possession of and owned by plaintiff on said last named date, were assessed by the assessor as "solvent credits" belonging to plaintiff.

Plaintiff's claim is that the same were exempt from taxation by State or municipal authority, under the provisions of section 3701 of the Revised Statutes of the United States, which provides that "all stocks, bonds, Treasury notes and other obligations of the United States shall be exempt from taxation by or under State, or municipal or local authority," the theory of plaintiff being that these orders were "obligations" of the United States within the meaning of that word as used in that section.

It is manifest that these orders are not within the reason and scope of the rule forbidding such taxation by the States as may tend to destroy the powers of the National Government or impair their efficiency, a rule which exists independently of any statute of the United States, and which cannot be impaired by any State constitutional provision.

It is because, as declared by the United States Supreme Court in McCulloch *v.* Maryland, 4 Wheaton, 316, "States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by
33 Congress to carry into execution the powers vested in the General Government" that Government bonds and other promises of the Government are beyond the taxing power of the States. The authority to borrow money on the credit of the United States is not only absolutely essential to the existence of the Government, but it is the enumeration of powers expressly granted by the Constitution, (see Banks *v.* Mayor, 7 Wall. 16) and taxation by the States of the means employed by the Government in the exercise of that power would tend to impair its efficiency. As was said by Chief Justice Marshall in McCulloch *v.* Maryland, *supra*, "The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised and have a sensible influence on the contract. * * * To any extent, however inconsiderable, it is a burden upon the operations of the Government. It may be carried to an extent which shall arrest them entirely." Solely for this reason, a promise of the Government "securing the payment stipulated to the holder by the pledge of the national faith," in whatever form it might be, was always held to be exempt from taxation by the States. The only ground upon which it was held that United States notes and bills intended to circulate as money were exempt from taxation, was that the courts could not say that their usefulness and value as means to the exercise of the functions of government would not be injuriously affected by State taxation, and that it was, therefore, within the discretion of Congress to determine

whether their usefulness as a means of carrying on the Government would be enhanced by exemption from taxation (Bank *v.* Supervisors, 7 Wall. 26).

While the courts of the United States have been steadfast and vigilant in upholding a principle so essential to the existence of the National Government, they have been as vigilant in confining
34 the operation of that principle to those cases where its application was necessary for the protection of some power of the Government. In National Bank *v.* Commonwealth, 76 U. S. 353, a case involving the question of taxability of shares of stock of national banks, the Supreme Court said: "The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of securing to the General Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the State."

Although public lands of the United States are exempt from State taxation, it is well settled that where all the conditions for a patent from the Government have been complied with, and nothing remains to be done but the issuance of the patent conveying the legal title, which can be obtained at any time by the donee or purchaser, he is to be treated as the beneficial owner of the land, and it is subject to taxation. In Wisconsin Central R. R. Co. *v.* Price Co. 133 U. S. 496, the Supreme Court of the United States in discussing this matter, said, through Mr. Justice Field, "This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the Government to avoid
35 his just share of State taxation." (See also N. P. R. R. Co. *v.* Patterson, 154 U. S. 130; Cooley on Taxation, p. 88; Mitchell *v.* Board of Commissioners, 91 U. S. 206; Shotwell *v.* Moore, 129 U. S. 590, 596.)

It is impossible to conceive of any reason why the taxation by the State of the orders in question would injuriously affect the power of the Government to borrow money, or any other function of the Government. They were not issued as a means of executing any constitutional power of the Government. The transaction as to the quarter-yearly interest, for the payment of which they had been given by the Government and received by the plaintiff, had been closed. The obligation of the Government in regard thereto had been fully satisfied. The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself. The only possible object to be attained by their exemption would be to enable the holder to avoid its just share of

State taxation. They are clearly within the reason for the exception to the general rule stated in Wisconsin Central R. R. Co. *v.* Price Co., *supra*, and hereinbefore set forth, for plaintiff had the right to the immediate possession of the money evidenced thereby, and was not excluded from such possession, except so far as it might be excluded by a desire to escape taxation. The case of The Banks *v.* The Mayor, 7 Wall. 16, relied on by plaintiff, is not in point. The certificates there involved were certificates of indebtedness, issued by the Government, payable in one year or earlier, at the option of the Government, and bearing interest, and were issued at a time when full money payment was impossible, and the Government was using its credit to obtain further time. They were promises of the Government,
to the observance of which the national faith was pledged,
36 undistinguishable from the bonds of the Government issued
for borrowed money, and there is not the slightest analogy between them and the orders here involved. It may well be doubted whether it is within the constitutional power of Congress to provide for the exemption from State taxation of orders similar to those here involved. However that may be, we are satisfied that Congress has not attempted to provide for such exemption. The statute relied on (sec. 3701 Rev. Stat.) was enacted simply in furtherance of the principle enunciated in McCulloch *v.* Maryland, *supra*, and to indicate the determination of Congress that the usefulness of certain instruments as a means of carrying on the Government would be enhanced by exemption from taxation. (See Bank *v.* Supervisors, *supra*.) The words "and other obligations" read in connection with the context "stocks, bonds, Treasury notes" include only obligations of the Government similar in character to those specifically named, and given under the general power to borrow money on the credit of the United States and to issue in return therefor obligations in any appropriate form (see Legal Tender case, 110 U. S. 421, 444), and do not include checks given in payment of such obligations.

Learned counsel for plaintiff have not cited a single case in which it was held that the mere check of the Government, payable on demand, is exempt from taxation, and we have not been able to find any case in which any such claim has been made. While the act of Congress of 1894 (Rev. Stat. vol. 2, p. 236) to subject to State taxation national bank notes and United States notes and certificates payable on demand, and intended to circulate as money, does
not include orders like those here involved, it shows the de-
37 termination of Congress that the exemption of promises of
the United States of the kinds therein named was no longer necessary for the protection of *the* any governmental power. It cannot be doubted that had Congress deemed that any question could arise as to the taxability of checks of the Government payable on demand, it would have included them in the act modifying section 3701. But, as we have seen, such checks were never included in the provisions of said section and were never exempt from taxation.

regular form levied a tax of and at the rate of $1.63 on each
11 one hundred ($100.00) dollars in value of all of the property included within said assessment book, wrongfully including in said tax levy the personal property of the plaintiff hereinbefore specifically set forth, which said tax upon said property of plaintiff so improperly included within said assessment book amounted to the sum of twenty-eight thousand, two hundred and eighty-one and 21-100 ($28,281.21) dollars. The said assessment book thereafter and within the time limited by law was regularly received by the tax collector of the defendant, and said tax became payable, and was payable, on said 27th day of November, 1899.

X.

On, to-wit, the 5th day of April, 1900, the plaintiff presented its petition and demand to the board of supervisors of the defendant for the return of the sum of one thousand, nine hundred and eighty-six and 55-100 ($1986.55) dollars; and on, to-wit, the 21st day of May, 1900, the plaintiff presented to the board of supervisors of the defendant its petition demanding the return of twenty-six thousand, four hundred and ninety-five and 66-100 ($26,495.66) dollars, the remainder of the sum paid by the plaintiff under protest, as hereinbefore set forth, which said petition was on said 21st day of May, 1900, rejected by said board of supervisors.

12 XI.

The defendant collected and retains from the plaintiff the sum of twenty-six thousand, three hundred and twenty-four and 50-100 ($26,324.50) dollars, being the tax assessed upon the bonds of the quasi-public corporations, owned by the plaintiff and assessed at the sum of one million, six hundred and fifteen thousand ($1,615,000.00) dollars, as hereinbefore alleged, and retains the whole of said sum of twenty-six thousand, three hundred and twenty-four and 50-100 ($26,324.50) dollars without right, and has refused and still refuses to refund to the plaintiff the whole or any part thereof, although the plaintiff has demanded the return thereof.

XII.

Less than six months elapsed between the time when said tax was paid under protests as aforesaid, and the commencement of this action.

Second Cause of Action.

The plaintiff further complains of the defendant and alleges that:

I.

The plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws

of the State of California and having its principal place of
13 business in the city and county of San Francisco, State of California.

II.

The defendant heretofore, within the time limited by law, caused all of the real and personal property in the said city and county of San Francisco subject to taxation for the fiscal year ending July 30, 1900, to be assessed to the owners and the reputed owners thereof, and the said assessment was regularly entered into the annual assessment book of said city and county for said year; and in addition thereto there was entered in said annual assessment book and assessed to this plaintiff certain personal property not subject to taxation.

III.

The total amount of personal property assessed to plaintiff as aforesaid, was of the value of two million, six hundred and one thousand three hundred and seventy-seven ($2,601,377.00) dollars, included within which were the following items, to wit: "Bonds," valued therein at the sum of one million, six hundred and fifteen thousand ($1,615,000.00) dollars; and "solvent credits," valued at one hundred and thirty-two thousand, three hundred and seventy-five ($132,375.00) dollars.

14 IV.

The said item of "solvent credits," valued as aforesaid, comprise two certain checks of the United States of America, drawn upon itself in favor of the plaintiff, for interest in the total amount of one hundred and twenty-one thousand, eight hundred and seventy-five ($121,875.00) dollars, due from the said United States to the plaintiff upon bonds of said United States, owned and held by the plaintiff, a true copy of which said checks are hereto annexed, marked Exhibits A and B and made a part hereof.

V.

The plaintiff did not make return of either of said two checks of the United States of America for assessment, and has never consented to any assessment thereof.

VI.

After said assessment was made and during the period the same was under the jurisdiction and control of the board of supervisors of the defendant, sitting as a county board of equalization, the plaintiff presented to said board, sitting as aforesaid, its petition setting forth the facts concerning said assessment and praying that the aforesaid items and others be stricken from said assessment, which said petition was by said board denied.

15 VII.

After said assessment book was received by the tax collector, and the taxes for said fiscal year became payable, the plaintiff, as the owner of the aforesaid property, claimed that the assessment to the plaintiff was void in that part comprising the aforesaid and other property, and thereupon, under the provisions of section 3819 of the Political Code of California, paid to the tax collector of the defendant, and said tax collector received from plaintiff, on the 27th day of November, 1899, as a tax theretofore levied by the board of supervisors of the defendant upon property of the plaintiff, and included within said assessment for said fiscal year ending July 30, 1900, the sum of forty-seven thousand, eight hundred and eighty-five and 77-100 ($47,885.77) dollars, whereof the sum of twenty-eight thousand, four hundred and eighty-two and 21-100 ($28,482.21) dollars, being the portion of said tax levied upon the property hereinbefore specified and other property, was paid under protest, which said protest was in writing, and was by plaintiff delivered to, and was received by, said tax collector on said 27th day of November, 1899, and was in the words and figures following:

16 To Edward I. Sheehan, tax collector of the city and county of San Francisco, State of California:

The undersigned, The Hibernia Savings and Loan Society, does herewith pay you the sum of $47,885.77, being the amount claimed by you as said tax collector for city and county and State taxes for the fiscal year ending June 30th, 1900, as shown by your tax bill designated and marked "Vol. 6, page 16, block 258, sub. 2."

Said society does hereby admit that the sum of $19,403.36 is due said city and county and State, but does hereby protest against the payment of any amount in excess thereof. You are hereby notified that said society does herewith pay you the sum of $28,482.21 under protest.

The grounds of the protest of said society are the following:

I.

Of the amount herewith paid under protest the sum of $26,324.50 is a tax assessed upon the bonds of quasi public corporations, owned by this society and assessed at the sum of $1,615,000.00. The property of said corporations upon which said bonds are based being already assessed and a tax paid thereon; the above tax and assessment against this society is illegal and void. Said assessment
17 is contrary to the constitution and the laws of the said State of California.

II.

Of the amount herewith paid under protest the sum of $171.16 is a tax upon bonds of quasi public corporations, held by this society as

security for the payment to it of money loaned. Said tax and assessment is illegal and void for the reasons designated in paragraph I hereof.

III.

Of the amount herewith paid under protest the sum of $1,986.55 is a tax upon:

(*a.*) That certain draft of the United States Treasurer, drawn on the United States Treasury, No. B953,437, dated on the first day of January, 1899, for the sum of one hundred and twenty thousand ($120,000.00) dollars, the same being for interest due on said day from the United States to this claimant on the United States registered four per cent. bonds of 1907, and

(*b.*) That certain draft of the United States Treasurer, drawn on the United States Treasury, No. B77,905, dated on the first day of February, 1899, for the sum of one thousand, eight hundred and seventy-five ($1,875.00) dollars, the same being for interest due on the said day of February, 1899, from the United States to this
18 claimant on United States registered three per cent. bonds of 1908.

Said tax of $1,986.55 is void under the provisions of section 3701 of the Revised Statutes of the United States, which provides that all stocks, bonds, Treasury notes and other obligations of the United States shall be exempt from taxation by State or municipal authority.

This protest is made under section 3819 of the Political Code of the State of California.

In witness whereof, the said The Hibernia Savings and Loan Society has caused this protest to be signed in its name by its secretary, on this 27th day of November, 1899.

THE HIBERNIA SAVINGS AND LOAN SOCIETY,
By ROBERT J. TOBIN, Secretary.

(Endorsed:) Received and filed within protest Nov. 27, '99. E. J. Sheehan, tax collector.

VIII.

Prior to said 27th day of November, 1899, and at the time fixed by law therefor, the board of supervisors of the defendant, in due and regular form, levied a tax of and at the rate of $1.63 on each one hundred ($100.00) dollars in value of all of the property included within said assessment book, wrongfully included in said tax levy the personal property of the plaintiff hereinbefore specifically
19 set forth which said tax upon said property of plaintiff, so improperly included within said assessment book, amounted to the sum of twenty-eight thousand, two hundred and eighty-one and 21-100 ($28,281.21) dollars. The said assessment book there-

after and within the time limited by law was regularly received by the tax collector of the defendant, and said tax became payable and was payable, on said 27th day of November, 1899.

IX.

On, to-wit, the 5th day of April, 1900, the plaintiff presented its petition and demand to the board of supervisors of the defendant for the return of the sum of one thousand, nine hundred and eighty-six and 55-100 ($1,986.55) dollars; and, on, to-wit, the 21st day of May, 1900, the plaintiff presented to the board of supervisors of the defendant its petition demanding the return of twenty-six thousand, four hundred and ninety-five and 66-100 ($26,495.66) dollars, the remainder of the sum paid by the plaintiff under protest as hereinbefore set forth, which said petition was on said 21st day of May, 1900, rejected by said board of supervisors.

X.

The defendant collected and retains from the plaintiff the sum of one thousand, nine hundred and eighty-six and 55-100 ($1,986.55) dollars, being the tax assessed upon the draft of the United States Treasurer, drawn on the United States Treasury, and assessed at the sum of one hundred and twenty-one thousand, eight hundred and seventy-five ($121,875.00) dollars, as hereinbefore alleged, and retains the whole of said sum of one thousand, nine hundred and eighty-six and 55-100 ($1,986.55) dollars without right, and has refused and still refuses to refund to the plaintiff the whole or any part thereof, although the plaintiff has demanded the return thereof.

XI.

Less than six months elapsed between the time when said tax was paid under protest, as aforesaid, and the commencement of this action.

Wherefore, plaintiff prays that it may have judgment against the defendant for the sum of twenty-six thousand, three hundred and twenty-four and 50-100 ($26,324.50) dollars, together with interest thereon from the 27th day of November, 1899; that it also have judgment against the defendant for the sum of one thousand, nine hundred and eighty-six and 55-100 ($1,986.55) dollars, together with interest thereon from the 27th day of November, 1899; for its costs of suit, and for such other and further relief as may be meet in the premises.

TOBIN & TOBIN,
Attorneys for Plaintiff.

20a Insert No. 1 to page 21.

"EXHIBIT A."

E
L K C

JANUARY 1, 1899.

Four Per Cent. Consols of 1907.

Quarter-yearly Interest B953473

Due this Day on Registered Bonds.

Washington, D. C. 5th Series.

$120000

The Treasurer or an Assistant Treasurer of the United States

Pay to the Hibernia Savings and Loan Society of San Francisco, Cal. or order one hundred and twenty thousand dollars, and charge Treasurer U. S. in general account. $120,000.

ELLIS H. ROBERTS,
Treasurer of the United States.

Countersigned:
U. S. U. S.
S. K. PETINGALE.

20b This check, properly countersigned and indorsed, is payable any time within four months from its date, at the U. S. Treasury offices in Washington, Boston, New York, Philadelphia, Baltimore, Cincinnati, Chicago, St. Louis, New Orleans, and San Francisco. After that period it is payable only at the U. S. Treasury in Washington.

20c Insert No. 2 to page 21.

"EXHIBIT B."

E
L K C

JANUARY 1, 1899.

Three Per Cent. Consols of 1908.

Quarter-yearly Interest B77905.

Due this Day on Registered Bonds.

Washington, D. C. 5th Series.

$1875

The Treasurer or an Assistant Treasurer of the United States.

Pay to the Hibernia Savings and Loan Society of San Francisco, Cal. or order one thousand eight hundred and seventy-five dollars, and charge Treasurer U. S. in general account. $1875.

ELLIS H. ROBERTS,
Treasurer of the United States.

Countersigned:
U. S. U. S.
S. K. PETINGALE.

FILE COPY.

No. 154

Office Supreme Court U. S.
FILED
DEC 14 1905
JAMES H. McKINNEY,
Clerk.

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1905.)

HIBERNIA SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

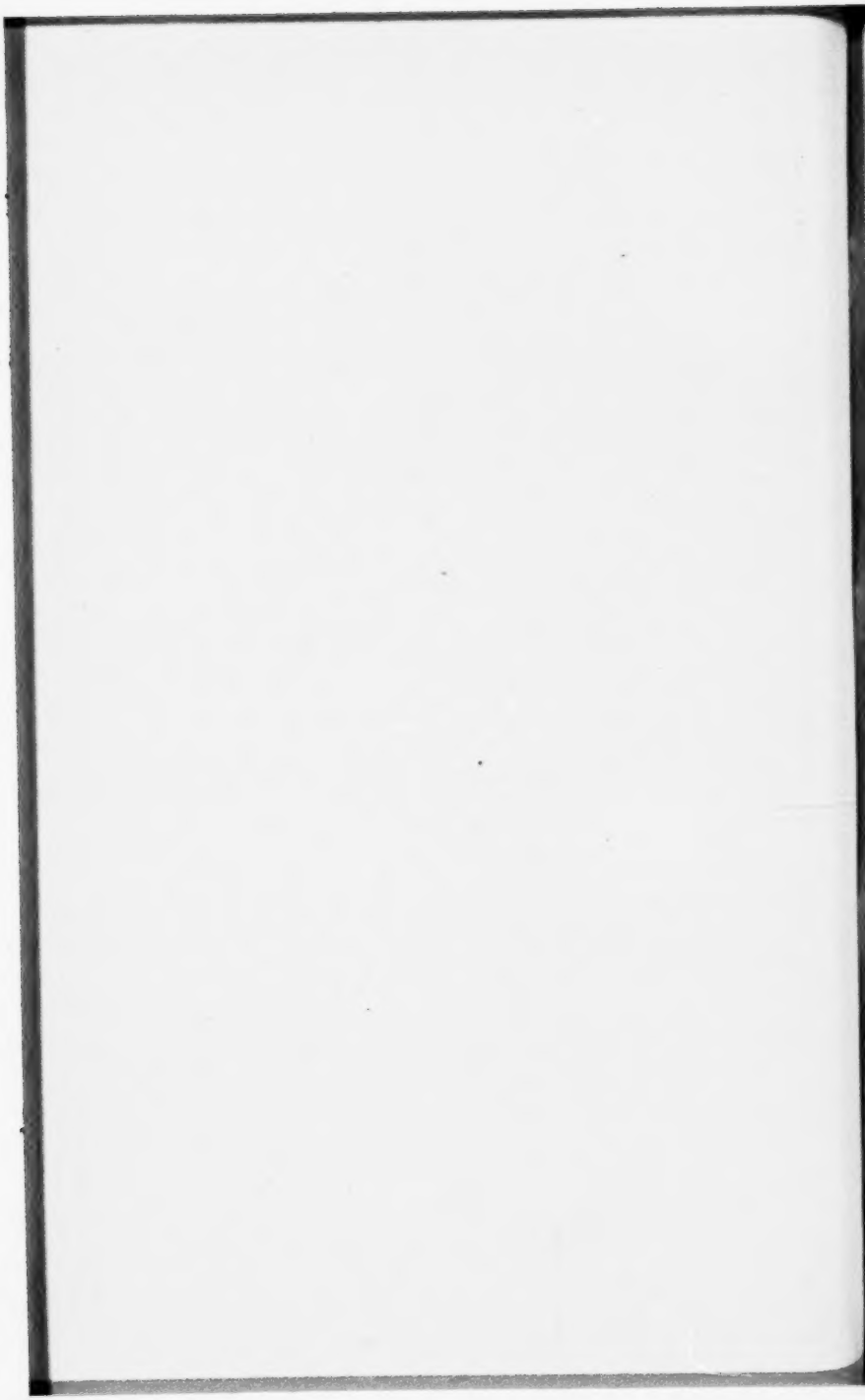
CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

Brief for Plaintiff in Error.

TOBIN & TOBIN,
T. C. VAN NESS,
Attorneys for Plaintiff in Error.

Filed this ..... day of ....., 1905.

THE JAMES H. BARRY CO.



In the Supreme Court of the United States

OCTOBER TERM, 1905

HIBERNIA SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

On the first Monday of March, 1899, The Hibernia Savings and Loan Society, plaintiff in error, had in its possession two certain obligations of the United States, drawn by its Treasury Department in payment of the interest accruing upon certain registered bonds of the United States then the property of said Society. By statutory provision, the said Monday is designated as the day upon which return must be made to the Assessor of the City and County of San Francisco, for the purpose of taxation, of all taxable property within the jurisdiction of said municipality. Plaintiff in error did not list for assessment among its taxable

credits the two said obligations of the United States Government. But the said official in making up his assessment roll for the ensuing fiscal year included said obligation therein. (Page 7 of Transcript of Record.)

Thereafter plaintiff in error filed its petition with the Board of Equalization of said City and County praying to be relieved from said assessment, and upon the rejection thereof by said Board, paid the tax so levied to said municipality. This payment was made under protest, and on the 3rd of December, 1900, plaintiff in error filed its complaint to recover from said City and County the amount so paid. From an adverse judgment thereon in the Courts of California, plaintiff has prosecuted an appeal to this Honorable Court.

An inspection of the record will disclose the fact that two causes of action are set forth in plaintiff's complaint. The first cause of action is addressed to the taxation of the bonds of certain quasi-public corporations owned by plaintiff, and no appeal is taken by defendant from that part of said judgment holding that plaintiff recover thereon from said defendant the sum of twenty-six thousand, three hundred and twenty-four and fifty-hundredths ($26,324.50) dollars. Upon the second cause of action judgment went for the defendant, a general demurrer thereto having been sustained by the Court. (Transcript on Appeal, page 13, folio 24.)

The sole question, therefore, presented to this Court for decision is, are Federal obligations of the character in plaintiff's complaint set forth, the proper subject of taxation by municipal and State authority? (Transcript, page 11, folios 20a and 20b.)

I.

The obligation referred to is simply a check or order drawn by the Treasurer of the United States upon the Federal Treasury, in favor of The Hibernia Savings and Loan Society, for a designated amount. The check or obligation further shows the purpose for which it is issued, and the time and place of payment. (Transcript, page 11, folios 20a and 20b.)

"All property in the State, not exempt under the "laws of the United States, shall be taxed in propor- "tion to its value."

Constitution of California, Article XIII, Section 1.

"All stocks, bonds, treasury notes, and other obli- "gations of the United States shall be exempt from "taxation by or under State, or municipal or local "authority."

U. S. Revised Statutes, No. 3701.

The words of this statute are simple and direct. Little appears to be left for inference and construction. The controversy at once resolves itself to the

inquiry, Are these checks "obligations" of the United States?

By Webster, obligation is defined to be: "1st— "The act of obligating or binding. * * * 3rd— "Especially, any act by which any person becomes "bound to do something to or for another, or to for- "bear something."

The Civil Code of California, compiled by the late Justice Field, says, Section 1427:

"An obligation is a legal duty by which a person "is bound to do or not to do a certain thing."

In fact, there is not and cannot be any dispute as to the meaning of a word where authoritative sanction is given to incessant and constant usage.

It is equally beyond question that by the terms of the foregoing checks the United States does promise and contract to pay to the plaintiff in error a fixed sum of money at a time and place certain. The Federal Government thereby contracts and undertakes to do a certain act, and the written evidence of this contract and agreement is assuredly "an obligation of the United States."

Let it be conceded for the moment that the obligation is not itself a vital function or part of the original bonded debt. Let it be conceded that the interest upon the Federal bond has been liquidated by the execution and delivery of this check. But is not this merely the substitution of one obligation for

another? The interest obligation is discharged by the substitution therefor of the Treasury obligation.

If the Treasury Department had not issued this order, the obligation of the Government to meet the interest upon its bonds would not have been changed; nor could the property right of plaintiff in this, as yet, uncollected interest be made the subject of taxation by State authority.

Bank of Kentucky vs. *Commonwealth,* 9 Ken. Rep., 46.

In this case it was held by the Court of Appeals of Kentucky that an act of the State Legislature, providing for the assessment and collection of a tax of five per cent on the gross amount of income derived annually from the interest paid upon bonds of the United States, is repugnant to the Federal Constitution.

If, therefore, upon the assessment day in question, plaintiff in error had not yet received its Treasury check for accrued interest, its credit for the amount of that interest would not have been a legitimate subject for municipal taxation. Plaintiff in error is, we submit, in exactly the same position for the purposes of taxation, that it would occupy if it had received from the Federal Government a United States bond for the amount of accrued interest, instead of a certified Treasury check.

From whatever point of view, therefore, we look

Not being exempt under the laws of the United States, they are not exempt under the provisions of our constitution (art. XIII, sec. 1).

The judgment is affirmed.

ANGELOTTI, J.

We concur:
SHAW, J.
VAN DYKE, J.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed June 3, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of this court, this 29 day of December, A. D. 1904.

[Seal Supreme Court of California.]

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

38 Copy.

In the Supreme Court of the State of California, Dept. One.

HIBERNIA SAVINGS AND LOAN SOCIETY, App's, vs. CITY AND COUNTY OF SAN FRANCISCO, Resp's.	S. F., No. 2683. On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Angellotti J.

We concur.
SHAW, J.
VAN DYKE, J.

Whereupon, it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above entitled cause, be and the same is hereby affirmed.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 3d day of June, 1903, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 3d day of July, A. D. 1903.

[SEAL.]

FRANK C. JORDAN, Clerk,
By ROBERT D. DUKE, Deputy.

39 [Endorsed:] S. F. No. 2683 In the supreme court, State of California. Remittitur. Hibernia Saving- and Loan Society, app's, *vs.* City and County of San Francis. resp's Clerk's costs $— Paid by appellant, $10. Paid by respondent, $— Total $10. Frank C. Jordan, clerk. By R. D. Duke deputy.

40 In the Supreme Court of the State of California, Dept. One.

HIBERNIA SAVINGS AND LOAN SOCIETY, App's, *vs.* CITY & COUNTY OF SAN FRANCISCO, Resp's.	S. F., No. 2683. On Appeal from the Superior Court of the City and County of San Francisco.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a remittitur filed June 3, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 29 day of December, A. D. 1904.

[Seal Supreme Court of California.]

FRANK C. JORDAN, Clerk,
By I. ERB, Deputy.

41 [Endorsed:] S. F. No. 2683 In the supreme court, State of California. Hibernia Savings & Loan Soc'ty, app's, *vs.* City & County of San Francisco, resp's. Certified copy of opinion.

42 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

THE HIBERNIA SAVINGS AND LOAN SOCIETY, Plaintiff in Error,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant in Error.

Comes now the plaintiff in error in the above entitled cause and petitions the Hon. Justice McKenna, a judge of the Supreme Court of the United States, for an order allowing the said plaintiff in error to prosecute a writ of error to the honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, from the final judgment heretofore entered in the above entitled cause by the supreme court of the State of California against said plaintiff in error and in favor of said defendant in error; and

Your petitioner further prays that an order be made fixing the amount of security which the plaintiff in error shall give and furnish upon said writ of error that it will answer all damages and costs

suffered by said defendant in error in the prosecution of this appeal in case said plaintiff in error should fail to make its plea good.

Your petitioner further represents that heretofore and within the proper time your said petitioner did apply to the Hon. W. H. Beatty, chief justice of the said supreme court, State aforesaid, for the allowance by him of a writ of error herein, which said application was by the said Hon. Chief Justice Beatty denied.

TOBIN & TOBIN,
Attorneys for Plaintiff in Error.

December 5, 1904.

43 [Endorsed:] United States of America. In the Supreme Court of the United States. The Hibernia Savings and Loan Society, plaintiff in error vs. The City and County of San Francisco, defendant in error. Petition for writ of error. T. C. Van Ness & Tobin & Tobin, att'ys for plaintiff in error.

44 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

THE HIBERNIA SAVINGS AND LOAN SOCIETY, Plaintiff in Error,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant in Error.

Know all men by these presents, that the undersigned, The Hibernia Savings and Loan Society, as principal, and James R. Kelly and Robert J. Tobin, as sureties, are held and firmly bound unto The City and County of San Francisco, the defendant in error, in the sum of five hundred ($500.00) dollars, to be paid to the said City and County, its successors or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Whereas, the above named plaintiff in error has sued out a writ of error to the Supreme Court of the United States, to reverse the judgment of the supreme court of the State of California heretofore entered in said cause.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

45 Sealed with our seals and dated the — day of ——, 1904.

{ Seal of the Hibernia Savings and Loan Society, San Francisco, Cal. Incorporated August 30th, 1864. }

THE HIBERNIA SAVINGS AND LOAN SOCIETY,
By JAMES R. KELLY, Its President.
JAMES R. KELLY.
ROBERT J. TOBIN.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

James R. Kelly and Robert J. Tobin, the persons named in and who subscribed the foregoing bond as the sureties thereto, being severally duly sworn, each for himself, says: that he is a resident and freeholder within said State of California and is worth the amount specified in said bond as the penalty thereof over and above all his just debts and liabilities exclusive of property exempt from execution and forced sale.

JAMES R. KELLY.
ROBERT J. TOBIN.

Subscribed and sworn to before me, this 31st day of October, 1904.

{Seal of Charles T. Stanley, Notary Public, City and County of San Francisco, Cal.}

CHAS. T. STANLEY,
Notary Public in and for the City and County of San Francisco, State of California.

Approved:
JOSEPH McKENNA,
Associate Justice Supreme Court of the United States.

46 [Endorsed:] United States of America. In the Supreme Court of the United States. The Hibernia Savings and Loan Society, plaintiff in error, *vs.* The City and County of San Francisco, defendant in error. Bond on writ of error. T. C. Van Ness & Tobin & Tobin, att'ys for plaintiff in error.

47 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Hibernia Savings and Loan Society, appellant, and The City and County of San Francisco, respondent-, wherein was drawn in question the validity of a treaty or statute of, or an anthority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

or wherein was drawn in question the construction of a clause
48 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of December, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court
of the United States.

49 UNITED STATES OF AMERICA, ss:

To the City and County of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of California wherein The Hibernia Savings and Loan Society is plaintiff in error and you are defendant in erorr, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this sixth day of December, in the year of our Lord one thousand nine hundred and four.

JOSEPH McKENNA,
Associate Justice of the Supreme Court
of the United States.

50 On this 21st day of December, in the year of our Lord one thousand nine hundred and four, personally appeared Wil-

liam B. Ryder before me, the subscriber, a notary public in and for the city and county of San Franciso, State of California and makes oath that he delivered a true copy of the within citation to Eugene E. Schmitz, mayor of the city and county of San Francisco at 10.30 a. m. of December 21st 1904 at the office of the mayor, city hall, San Francisco.

WILLIAM B. RYDER.

Sworn to and subscribed the 21st day of December, A. D. 1904.

{ Seal of Charles T. Stanley, Notary Public, City and County of San Francisco, Cal. }

CHAS. T. STANLEY,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed on cover: File No. 19,589. California supreme court. Term No. 154. The Hibernia Savings and Loan Society, plaintiff in error, *vs.* The City and County of San Francisco. Filed January 4th, 1905. File No. 19,589.

within the very terms of Section 3701 of the Revised Statutes, as were the government bills and notes under discussion in *People* vs. *Connolly, supra,* within the terms of the then existing Statute of Exemption, are not the State Courts in both instances equally powerless to determine the effect of municipal taxation upon the facility with which the object of their issue may be accomplished? In *People* vs. *Connolly* this Honorable Court indicates that, perhaps, it is difficult to ascribe a sound reason for the exemption of Treasury notes and bills, saying:

"Nor is it easy to see that taxation of these notes, "used as money and held by individuals, can control "or embarrass the power of the Government in issu- "ing them for circulation, more than like taxation "embarrasses its power in coining and issuing gold "and silver money for circulation. * * * But, on "the other hand, it is equally clear that these notes "are obligations of the United States * * * and "we think it clearly within the discretion of Con- "gress * * * to provide by law for such exemp- "tion.

"There remains, then, only this question: Has "Congress exercised the power of exemption?"

We submit that this as well meets the point in issue in the cause at bar. The language of the first Act of February, 1862, 12 Stat., at L. 346 (see *People* vs. *Connolly, supra,* page 62), is,

"All United States bonds and other securities of "the United States shall be exempt from taxation by "State authority."

The line of reasoning adopted by the lower Court in the case at bar would have inevitably exempted from taxation Treasury bills and notes issued under this act, and yet this Court held otherwise.

If, therefore, prior to the amendment of 1894 (Supp. to Revised Statutes, Vol. 2. p. 236), subjecting these Treasury notes and gold certificates to State taxation, plaintiff in error had been paid the amount of its current interest on United States bonds in such notes or certificates, it could not have been taxed thereon. Why, therefore, in the case at bar, should these very similar obligations, not within the terms of that amendment, become the subject of State taxation?

The Statute of Exemption is very general in its terms and Congress, by the Act of 1894, has specifically indicated but one exception to those terms. Are the State Courts privileged to enlarge that field by inference and speculation; to themselves divide Federal obligations into those whose governmental function is hampered by State taxation, and those whose function is not so affected, and tax or exempt them accordingly. Has not Congress removed the whole subject from the realm of judicial speculation by de-

claring that all *obligations* pledging the credit of the United States shall be exempt from State taxation?

We submit that the cases cited in the opinion of the Court below holding that Government land is a proper subject for taxation when the legal title only remains in the Government, the equitable title being in private ownership, are not in point. (Transcript, page 18, folio 35.)

The rule is, public lands are exempt from State taxation, but in the cases cited the land has ceased to be public and is therefore taxable. But in the case at bar the property exempted has not changed or altered its character. It is still an obligation payable on demand, as a gold note or Treasury certificate. True, by the possession of this obligation plaintiff escapes State taxation, but so it would had it immediately purchased any other Federal bond or obligation. It might have converted these certificates into United States bonds and yet the odium of tax evasion could not be cast upon it.

In conclusion we submit, that whatever else may be said as to the essential character of the instrument sought to be taxed, that it is an *"obligation"* of the United States cannot for a moment be questioned. However plausible may appear the speculation and inference of the lower Court and counsel for defendant in error, in support of the contention that the reason upon which the principle of the exemption of Federal obligations from State taxation is based has

no application here, the fact remains that the direct, clear and concise language of Congress does lift the burden of municipal taxation from this obligation.

Respectfully submitted,

TOBIN & TOBIN,
T. C. VAN NESS,
Attorneys for Plaintiff in Error.

FILE COPY.

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JAMES H. McKENNEY,
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HIBERNIA SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

Brief for Defendant in Error.

PERCY V. LONG,
City Attorney.

WILLIAM I. BROBECK,
Assistant City Attorney,
Counsel for Defendant in Error.

Filed this ..... day of ....., 1905.

THE JAMES H. BARRY CO.

2

In the Supreme Court of the United States

OCTOBER TERM, 1905

HIBERNIA SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Writ of Error to the Supreme Court of the State of California.

On the 1st day of January, 1899, the Hibernia Savings and Loan Society, a corporation, having its principal place of business in the City and County of San Francisco, State of California, was the owner and possessed of certain registered bonds of the United States Government, theretofore issued and sold in accordance with Acts of Congress, and known as "Four per cent. Consols of 1907, fifth series", and "Three per cent. Consols of 1908, fifth series." Upon that date there became due and was payable, the

upon this question, we are ultimately brought back face to face with the proposition, is this an "*obligation* of the United States" within the meaning of the Revised Statutes.

II.

The decisions of this Honorable Court upon questions analogous to the proposition here at issue are numerous. As a general rule their tendency is to sustain the exemption of all Federal obligations from municipal taxation.

In *McCulloch* vs. *State of Maryland*, 4 Wheaton, 314, Chief Justice Marshall says:

"If the States may tax one instrument employed "by the Government in the execution of its power, "they may tax any and every other instrument. "* * * This was not intended by the American "people. They did not design to make their govern- "ment dependent on the States."

"An unbroken line of cases, adopting the princi- "ples of that decision" (*McCulloch* vs. *Maryland*, *supra*), "and too well known to require citation, has "established the inherent non-taxability by the States "of property held by the United States and of bonds "and obligations issued by the United States."

Howard Sav. Inst. vs. *Newark*, 44 Att. Rep., 654.

See, also:

Society of Savings vs. *Coite*, 6 Wall., 594.
People of State of New York vs. *Richard B. Connolly*, 7 Wall., 16.
Osborn vs. *Bank of U. S.*, 9 Wheat., 738.
Bank of Commerce vs. *New York City*, 2 Black, 620.
New Jersey vs. *Wilson*, 7 Cranch, 164.

But conceding that by authoritative and repeated expression this Court has firmly established this proposition, it is nevertheless contended by the Honorable Court from which this appeal is prosecuted, that these decisions are not in point as to the Federal obligation here involved. (Transcript pages 16 to 20.)

These obligations are for all purposes, save circulation as coin, identical in character with Treasury notes and United States gold certificates, payable on demand. This much is conceded by the opinion of the lower Court. (Transcript page 19, folio 37.)

Both are payable to the holder upon demand and upon mere presentation may be converted into coin. How then has this Court viewed these Treasury notes and gold certificates for the purposes of taxation?

In *People ex rel* vs. *Supervisors of N. Y.*, 7 Wall, 26, the Court says:

"That these notes were issued under the authority

" of the United States, and as a means to ends entirely
" within the constitutional power of the Government,
" was not seriously questioned upon the argument.

"But it was insisted that they were issued as money;
" that their controlling quality was that of money,
" and that, therefore, they were subject to taxation in
" the same manner, and to the same extent, as coin is-
" sued under like authority.

"And there is certainly much force in the argu-
" ment. It is clear that these notes were intended to
" circulate as money and, with the national bank
" notes, to constitute the credit currency of the
" country.

"Nor is it easy to see that taxation of these notes,
" used as money, and held by individual owners, can
" control and embarrass the power of the Government
" in issuing them for circulation, more than like taxa-
" tion embarrasses its power in coining and issuing
" gold and silver money for circulation. * * * *

"But, on the other hand, it is equally clear that
" these notes are obligations of the United States.
" Their name imports obligation. Every one of
" them expresses upon its face an engagement of the
" nation to pay to the bearer a certain sum. * * *

"Would, then, their usefulness and value as means
" to the exercise of the functions of government, be
" injuriously affected by state taxation?

" It cannot be said, as we have already intimated,
" that the same inconveniences as would arise from

" the taxation of bonds and other interest bearing ob-
" ligations of the government would attend the taxa-
" tion of notes issued for circulation as money. But
" we cannot say that no embarrassment would arise
" from such taxation. And we think it clearly with-
" in the discretion of Congress to determine whether,
" in view of all the circumstances attending the issue
" of the notes, their usefulness, as a means of carrying
" on the Government, would be enhanced by exemp-
" tion from taxation; and within the constitutional
" power of Congress, having resolved the question of
" usefulness affirmatively, to provide by law for such
" exemption.

" There remains, then, only this question: Has
" Congress exercised the power of exemption?

"A careful examination of the acts under which
" they were issued, has left no doubt in our minds
" upon that point.

"The act of February, 1862, 12 Stat. at L., 346, Sec. 2, declares that 'All United States bonds and
" 'other securities of the United States, held by indi-
" 'viduals, associations, or corporations, within the
" 'United States, shall be exempt from taxation by or
" 'under state authority.'

"We have already said that these notes are obliga-
" tions. They bind the national faith. They are,
" therefore, strictly securities. They secure the pay-
" ment stipulated to the holders, by the pledge of the
" national faith, the only ultimate security of all

"national obligations, whatever form they may as-
"sume."

As a result of this and other decisions of this Court, Congress enacted a statute subjecting these obligations to State taxation.

Supp. to Revised Statutes, Vol. 2, p. 236.

But even more directly in point is the reasoning of this Honorable Court in

People of N. Y. ex rel vs. *Connelly,* 7 Wall., 16.

The question here presented is the power of a municipality to tax a certificate of Federal indebtedness, issued in payment of goods delivered.

"An attempt was made at the bar to establish a dis-
"tinction between the bonds of the Government, ex-
"pressed for loans of money, and the certificates of
"indebtedness for which the exemption was claimed.
"The argument was ingenious, but failed to convince
"us that such a distinction can be maintained. It
"may be admitted that these certificates were issued
"in payment of supplies and in satisfaction of de-
"mands of public creditors. But we fail to perceive
"either that there is a solid distinction between cer-
"tificates of indebtedness issued for money borrowed
"and given to creditors, and certificates of indebted-
"ness issued directly to creditors in payment of their

" demands; or that such certificates, issued as a means " of executing constitutional powers of the Govern- " ment other than of borrowing money, are not as " much beyond control and limitation by the States " through taxation, as bonds or other obligations is- " sued for loans of money."

The brief of Messrs. O'Connor for the defendants in error in this case indicates a line of reasoning very similar to that outlined in the opinion of the State Court in the action here pending. (Page 58 of *People* vs. *Connolly, supra.*)

In the action at bar, commenting upon the decision of this Honorable Court in *People* vs. *Supervisors,* 7 Wall, 26, *supra,* the Supreme Court of California argues:

" The only ground upon which it was held that " United States notes and bills intended to circulate " as money were exempt from taxation, was that the " Courts could not say that their usefulness and value " as a means to the exercise of the function of govern- " ment would not be injuriously affected by State tax- " ation, and that it was, therefore, within the discre- " tion of Congress to determine whether their useful- " ness as a means of carrying on the Government " would be enhanced by exemption from taxation." (Transcript, page 17, folio 33.)

The obligations here in question being as clearly

and considered by this Court in prior decisions. To again quote from the opinion of the State Court:

"Learned counsel for plaintiff have not cited a "single case in which it was held that the mere check "of the government payable on demand, is exempt "from taxation, and we have not been able to find any "case in which such claim has been made."

Hibernia Savings and Loan Society vs. *San Francisco,* 139 Cal., 210.

The check is not in form or substance a promise to pay. There is nothing expressed, either in its language or its purpose, to indicate a reliance upon the credit of the government by either party. It is a present command, expressed in accordance with the provisions of Section 3698 of the Revised Statutes, requiring the Treasurer or an Assistant Treasurer of the United States to pay to plaintiff on its order the amount named therein. No credit is requested; none is required; none could be requested or granted under the section of the Revised Statutes referred to. Payment is contemplated to be made at once. The check is itself payment. The power conferred upon the Secretary of the Treasury and the definition of his duty, as found in Section 3698 of the Revised Statutes, neither justifies nor permits the further employment of the credit of the government in the discharge of its obligations to meet the accrued interest on its bonds. The section reads:

"The Secretary of the Treasury *shall cause to be "paid,* out of any money in the Treasury not other- "wise appropriated, any interest falling due, or ac- "cruing, on any portion of the public debt authorized "by law."

When any interest falls due or accrues on any portion of the public debt authorized by law, the Secretary of the Treasury shall cause such interest to be paid. He has no authority to extend the existing credit. He has no authority to create a new credit. His authority and duty are limited to making the payment. He may adopt such convenient methods in making such payments as the book-keeping necessities of his department may require, or the number and location of the payees may suggest, but it is in support of the national credit that the statute requires payment without qualification or condition of all interest due. We find accordingly that checks have been issued, payable *in praesenti* and drawn against unappropriated revenues which were at the time of issued and must always be sufficient to meet such drafts. Under such conditions the check constitutes payment in and of itself. It is equivalent to cash.

People vs. *Stockton and Visalia R. R.*, 45 Cal., 306-312.

Matter of Staten Island, etc., R. R. Co., 37 Hun., 422. Affirmed, 101 N. Y., 636.

Affirmed, 101 N. Y., 636.

Matter of Staten Island etc., R. R. Co., 38 Hun., 382.

Metropolitan Bank vs. *Sirret,* 97 N. Y., 320.

Wells vs. *Brigham,* 6 Cush., (Mass.) 6, per Shaw, J.

Cruger vs. *Armstrong,* 3 Johns, Cas. (N. Y.) 5.

Nords vs. *Schroeder,* 4 Harris and J., (Md.) 276.

The Secretary of the Treasury intended that the checks drawn upon the treasury by officers of his department should be accepted in payment of the interest due upon the bonds. He certainly did not intend, and could not have carried out his intention if he had so formed it, that a further extension of credit should be granted by the bond-holder to the government. Had such been his purpose it would undoubtedly have been appropriately expressed in the issuance of a promise to pay such as was passed upon in *Banks* vs. *Supervisors,* 7 Wallace, 26, in which the United States promised to pay to bearer the sum named in the treasury note, no time for payment being specified, and no fund having been provided out of which the promised payment could be made. The distinction between such an obligation and the method employed, in the instance before the Court, to extinguish an obligation, is manifest. It is the difference be-

tween the assumption of an obligation, and the extinguishment of an obligation.

Of course the exemption from State taxation, with which governmental agencies are clothed by necessity, obtains only so far and to no greater extent than is necessary to serve the purpose upon which it is based. When the purpose for which the agency was created has been fully subserved, and the agency has ceased with it, the reason for the exemption ceases and the power to tax is restored to the State. That which has ceased to be a governmental agency cannot continue to have impossed upon it a quality which was dependent upon the continuance of such agency. And that has ceased to be an agency when it has performed all the functions for the performance of which it was called into being. The United States bond, through the agency of which the Federal government exercised its power to borrow money together with the interest accruing thereon, were exempt from State taxation. But the checks, the taxation of which is complained of here, were not designed to evidence a loan made to the government. The loan had been made and had enjoyed full exemption from State interference. Interest thereon had accrued and had been paid. In payment, a check on the United States Treasury had been issued by the United States Treasurer. It is this check, held for over two months and until after the tax day—volun-

tarily held—that has been taxed. As the State Court said:

"It is impossible to conceive of any reason why the "taxation by the State of the orders in question would "injuriously affect the power of the government to "borrow money, or any other function of the govern- "ment. They were not issued as a means of executing "any constitutional power of the government. The "transaction as to the quarter-yearly interest, for the "payment of which they had been given by the gov- "ernment and received by the plaintiff, had been "closed. The obligation of the government in regard "thereto had been fully satisfied. The orders were "simply a convenient mode of payment of the obliga- "tion. They were for all practical purposes, the "money itself. The only possible object to be attain- "ed by their exemption would be to enable the hold- "er to avoid its just share of state taxation. They are "clearly within the reason for the exception to the "general rule stated in *Wisconsin Central R. R. Co.* "vs. *Price Co.*, 133 U. S., 496, and hereinbefore set "forth, for plaintiff had the right to the immediate "possession of the money evidenced thereby, and was "not excluded from such possession except in so far "as it might to excluded by a desire to escape taxa- "tion."

Hibernia Savings and Loan Society vs. *San Francisco*, 139 Cal., 208-9.

In the *Wisconsin Central* case, Mr. Justice Field stated the reason for the exception thus:

"This exception to the general doctrine is founded "upon the principle that he who has the right to "property, and is not excluded from its enjoyment, "shall not be permitted to use the legal title of the "government to avoid his just share of taxation."

Northern Pacific R. R. vs. *Patterson,* 154 U. S., 139.
Mitchell vs. *Commissioners,* 91 U. S., 206.
Shotwell vs. *Moore,* 129 U. S., 590-596.

And so in the case being considered, the checks were manifestly issued in discharge of the duty cast upon the Secretary of the Treasury to cause accrued interest to be paid; they were accepted as a discharge of the obligation of the government; the payee was vested with the immediate right of collection; the fund out of which they were to be paid was provided by law; was placed in the immediate enjoyment of the property. To sustain plaintiff in its attempted avoidance of a tax, otherwise free from criticism, would be an unwarranted extension of the doctrine of exemption and an unjustifiable and unnecessary denial of the right of the State to tax the property within its borders. Certainly no such exemption is necessary to protect the National Government, or any of its agencies, in this instance, and with the pass-

ing of such necessity passes also the application of the principle.

As was pertinently said by this Court in *National Bank* vs. *Commonwealth,* 9 Wallace, 353:

"The principle we are discussing has its limitation, "a limitation growing out of the necessity on which "the principle is founded. That limitation is, that "the agencies of the Federal Government are only ex- "empt from State legislation so far as that legislation "may interfere with or impair their efficiency in per- "forming the functions by which they are designed "to serve that government. Any other rule would "convert a principle founded alone in the necessity "of securing to the general government of the United "States the means of exercising its legitimate powers "into unauthorized and unjustifiable invasion of the "rights of the State."

When the conclusion has been reached that no power of the Federal Government has been interfered with by the imposition of the tax, all question as to the validity of the tax passes. Congress has not designed the legislation which has been passed from time to time exempting governmental agencies from taxation, to do more than that, and we submit, as clearly held by the Supreme Court of California, that no existing legislation goes any further.

In final submission the Court's attention is called to the fact that the foregoing argument has been pre-

pared without the advantage of having plaintiff's brief before us. The sudden calling of the case a month in advance of the time when it was anticipated it would be heard, has necessitated a hurried and imperfect preparation by both parties. The indulgence of the Court is requested in that behalf.

We respectfully submit the judgment of the Supreme Court of California should be affirmed.

Dated, San Francisco, December 8, 1905.

PERCY V. LONG,
City Attorney.

WILLIAM I. BROBECK,
Assistant City Attorney,
Counsel for Defendant in Error.

quarter-yearly interest, amounting on the 1907 bonds to $120,000 and on the 1908 bonds, to $1875, and upon that day and date there were issued two orders for these respective amounts signed by the Treasurer of the United States, addressed to "the Treasurer or an Assistant Treasurer of the United States", directing the payment to the Hibernia Savings and Loan Society, plaintiff in error, or to its order, of the said respective sums, such payments to be charged to the United States Treasurer in general account. (Folios 21a, 21b, 21c and 21d of Record.) Such drafts were issued in obedience to Section 3698 of the Revised Statutes of the United States, (Act February 9, 1847, Chapter 9, Volume 9. Statutes at Large, page 123), which requires the Treasurer to "*cause to be paid,* out of any money in the treasury not otherwise appropriated, any interest falling due, or accruing, on any portion of the public debt authorized by law." They were manifestly intended to "*cause to be paid*" the accrued interest on the bonds referred to, and according to endorsement such payment would be made by the Treasurer or an assistant Treasurer "*any time.*"

Instead of presenting these drafts or checks and receiving the coin therefor at the sub-treasury at San Francisco, or elsewhere, the plaintiff in error withheld them until after 12 o'clock, noon, of the first Monday in March, 1899, the day and hour when the

status of property for purposes of taxation was determined for that year.

Section 3628 and 3629, *Political Code of California.*

Dodge vs. *Nevada National Bank,* 109, Fed. Rep. 726.

In the assessment of properties for the fiscal year ending June 30, 1900, made between the first Mondays in March and July, 1899, the Assessor of the City and County of San Francisco included the sum of $121,875, and assessed the same to the Hibernia Savings and Loan Society, plaintiff in error, as solvent credits, said sum representing the face value of the two checks hereinbefore described. The provisions of the statute having been complied with by the respective officers charged with the duty of assessing property and levying the annual tax thereon, there became due and payable from Plaintiff in Error to the City and County of San Francisco and State of California the sum of $1,986.55 as taxes levied upon said valuation of said checks. Before delinquency, (Section 3746, Political Code of California), the tax so levied was paid by plaintiff in error to the Tax Collector of the City and County of San Francisco under written protest, in conformity to Section 3819 of said code. Thereafter, and within the period of six months from such payment, action was commenced in the Superior Court of the City and County of

San Francisco, State of California, to recover the tax so paid. Demurrer to that count of the complaint in this action which related to the recovery of this tax having been sustained without leave to plaintiff to amend, judgment passed in that behalf for defendant. From that portion of the judgment plaintiff appealed to the Supreme Court of the State of California, where the judgment was affirmed June 3rd, 1903.

Hibernia Savings and Loan Society vs. *San Francisco*, 139 Cal., 205.

Plaintiff in error having applied to this Court for writ of error, after application therefor to the Chief Justice of the Supreme Court of the State of California and denial thereof, the same was granted on December 6, 1904.

ARGUMENT.

The questions involved in this review concerned the power of the State to tax the checks issued by the United States Treasurer to himself or any assistant Treasurer, directing the payment of the amount due as interest on United States bonds.

The determination of these questions involves in the main the question whether the exercise of such taxing power will retard, impede, burden or in any manner control the free exercise, by the Federal Government, of the constitutionally conferred power to bor-

row money, or otherwise employ the national credit. There is no longer any room for a divergence of views on that subject. Congress possesses the undoubted power to relieve from taxation entirely by State or municipal authority or to permit of a limited employment of such power by such governments, such instrumentalities as may be employed by the National Government to effect its constitutional purposes. Such was the view expressed by Chief Justice Marshall, in *McCulloch* vs. *Maryland,* 4 Wheat., 316, and such is the view reiterated by the Supreme Court of California, in its opinion in this very case. To the same effect are the cases cited in plaintiff's brief.

This exemption from taxation enjoyed by Federal agencies is not without its limitations, however. It is based upon the necessity present in the National Government, as in all governments, of exercising freely and without interference the powers conferred upon it by the States. When that necessity is served, the reason for the exemption ceases and the inherent and reserved power of the State to tax everything within its boundaries not so exempted is re-asserted and may be re-employed. This limitation upon the exemption enjoyed by Federal agencies is stated thus by Mr. Justice Miller speaking for this Court in *National Bank* vs. *Commonwealth,* 9 Wall., 353-362:

"The principle we are discussing has its limitation, "a limitation growing out of the necessity on which

"the principle itself is founded. That limitation is, "that the agencies of the Federal Government are "only exempt from State legislation, so far as that "legislation may interfere with, or impair their ef- "ficiency in performing the functions by which they "are designed to serve that government. Any other "rule would convert a principle founded alone on the "necessity of securing the government of the United "States the means of exercising its legitimate powers, "into an unauthorized and unjustifiable invasion of "the rights of the States."

And Mr. Justice Strong, speaking for a majority of the Court in *Railroad Company* vs. *Peniston,* 18 Wall, 29-36, after reviewing the authorities cited to the point that the Union Pacific Railroad, incorporated by Act of Congress (12 Statutes at Large, 489), as a governmental agency, was exempt from State taxation; stated the Court's conclusion as follows:

"It is, therefore, manifest that exemption of Fed- "eral agencies from State taxation is dependent, not "upon the nature of the agents, or upon the mode of "their constitution, or upon the fact that they are "agents, but upon the effect of the tax; that is, upon "the question whether the tax does in truth deprive "them of power to serve the government as they were "intended to serve it, or does hinder the efficient ex- "ercise of their power."

The Supreme Court of California stated the prin-

ciple of exemption and its limitations in its opinion in this case as follows:

"While the Courts of the United States have been "steadfast and vigilant in upholding a principle so es- "sential to the existence of the national government, "they have been as vigilant in confining the opera- "tion of that principle to those cases where its appli- "cation was necessary for the protection of some "power of the government."

> *Hibernia Savings and Loan Society* vs. *San Francisco,* 139 Cal., 205-207.

The decision of the cause reduces itself, therefore, to a determination of the question whether the *ad valorem* tax imposed by the State of California and the City and County of San Francisco upon the checks issued by the United States Treasurer in payment of interest due upon United States bonds did impede, retard, burden, or in any manner control the operations of the Federal government in the exercise of its constitutional power to borrow money or otherwise employ the national credit. If this question can be answered in the negative, the judgment of the State Court must stand.

The checks themselves in form and purpose differ materially from any instruments employed by the government in the exercise of its borrowing power